84-1009

No.....

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ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

—o—

JON C. BAILEY, RANDY E. McCASLIN,
JOHN R. FINDLAY, and RODNEY LEIFHEIT,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

—o—

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23 pp

QUESTIONS PRESENTED

Whether, under current First Amendment standards, charging instruments in criminal prosecutions under the Illinois Obscenity Statute must specify the essential components of Illinois' definition of obscenity because the statute, on its face and as construed, is confusing and ambiguous.

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No.....

In The
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JON C. BAILEY, RANDY E. McCASLIN,
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Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on June 27, 1984.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at 125 Ill.App.3d 346, 465 N.E.2d 979 (1984). A copy of the opinion is included in the Appendix as Exhibit A.

———o———

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1257(3) for review by certiorari of the decision of the Illinois Appellate Court, Second District. A written opinion was issued by that court on June 27, 1984. Petitioners sought leave to appeal from the Illinois Supreme Court in a timely fashion. On October 2, 1984, the Illinois Supreme Court denied their petition for leave to appeal. A copy of the order denying leave to appeal is included in the Appendix as Exhibit B.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States, and the Illinois Obscenity Statute, Ch. 38, §11-20, Ill.Rev.Stat., are set forth in the Appendix as Exhibit C.

———o———

STATEMENT OF THE CASE

Petitioners, all employees of the Denmark Bookstore, Aurora, Illinois, were each charged with violating the Illinois Obscenity Statute, Ch. 38, §11-20, Ill.Rev.Stat. The charging instrument in each case alleged that the petitioner sold obscene material to an individual, which material:

> [W]hen considered as a whole, has as its predominate appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion and which goes substantially beyond customary limits of candor in description or representation of such matters and has no serious, literary, artistic, political or educational value.

The petitioners filed motions to dismiss, alleging, *inter alia,* that the complaints were insufficient for their failure to include the statement that the work was "utterly without redeeming social value" as a definitional element of the term obscenity. The Kendall County trial court granted the petitioners' motions to dismiss, basing its holding on *People v. Ridens,* 59 Ill.2d 362, 321 N.E.2d 264 (1974). The respondent argued that it was not required to allege the definitional elements set forth in *Ridens;* rather, that it is only required to allege a complaint in the statutory language. Respondent further argued that any definitional language contained in the complaints was mere surplusage which had no affect on the validity of the complaints.

The Illinois Obscenity Statute, Ch. 38, §11-20, Ill.Rev. Stat., was enacted in 1961 and has not been substantively amended by the legislature since that time. The statutory definition of obscenity is:

> A thing is obscene if, considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photopraghs.
>
> Ch. 38, §11-20(b), Ill.Rev.Stat.

The statute has been construed to follow the standards for obscenity set forth by this Court in *Memoirs v. Massachusetts,* 383 U.S. 415 (1966) and *Roth v. United States,* 354 U.S. 476 (1957). *People v. Ridens, (Ridens I),* 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois,* 413 U.S. 912 (1973). In 1974, the statute was construed to embrace the standards set forth by this Court in *Miller v. California,* 413 U.S. 15 (1973), although the third definitional element "utterly without redeeming social value" was retained. *People v. Ridens, Ridens (II),* 59 Ill.2d 362, 321 N.E.2d 264 (1974). The extent of the adoption of the *Miller* standards peaked when, in 1977, this Court recognized that the Illinois Supreme Court had meant to engraft the *Miller* examples of "patently offensive sexual conduct" under part (b) of the tripartite test for obscenity, in *Ward v. Illinois,* 431 U.S. 767 (1977). The Illinois Supreme Court has continued to adhere to this judicial construction of the Illinois Obscenity Statute. *People v. Stromblad,* 74 Ill.2d 35, 383 N.E.2d 969 (1978). With this history, the trial court in the instant case dismissed the complaints, recognizing First Amendment notice requirements for obscenity cases.

The respondent filed notices of appeal from the orders dismissing the complaints in each case to the Appellate Court of the State of Illinois, Second District, where the cases were consolidated for appeal. In the Second District Appellate Court petitioners argued that the trial court's ruling was proper, in that the complaints were legally defective for asserting inapplicable elements of the offense of obscenity under Illinois law, and further, that the Illinois Obscenity Statute failed to give proper notice to putative defendants.

The Second District Appellate Court reversed the trial court's orders granting the petitioners' motions to dismiss, holding that it was unnecessary to set forth the elements of the definition of obscenity, relying on *People v. Vavrys*, 47 Ill.App.2d 258, 198 N.E.2d 187 (1964), and further, that such definitional statement would constitute mere surplusage. The court also rejected petitioners' First Amendment claims that the statute failed to give proper notice to defendants, which therefore required that the terms of the definition of obscenity be set forth in the charging instrument. Basing its reasoning on the *Ridens* decision, the court concluded it was the statute itself and not the charging instrument which must give advance warning to a defendant of the meaning of obscenity.

Petitioners sought timely review by the Illinois Supreme Court, filing a petition for leave to appeal. Petitioners again asserted that the Illinois Obscenity Statute fails to give proper notice to defendants, and that because the essential elements for the charge of obscenity do not exist facially in the Illinois Obscenity Statute, the elements must be asserted in the charging instruments to adhere to First Amendment standards. Their petition for leave

to appeal was denied on October 2, 1984. The mandate of the Illinois Supreme Court has been stayed pending review by this Court.

In the trial court, the appellate court, and by petition for leave to appeal in the Illinois Supreme Court, the petitioners have asserted their constitutional claims under the First and Fourteenth Amendments to the Constitution of the United States. The Second District Appellate Court rejected those claims, and the Illinois Supreme Court denied leave to appeal.

———o———

REASONS FOR GRANTING THE WRIT

Under The Notice Requirements Of Miller v. California, 413 U.S. 15 (1973), A Criminal Complaint Charging A Violation Of The Illinois Obscenity Statute Must Specify The Tripartite Definition Of Obscenity And Designated Sexual Conduct Of Alleged Obscene Works To Be Constitutionally Sufficient.

This Court has recognized a constitutional responsibility in criminal obscenity statutes to afford notice to a bookseller that his conduct may run afoul of the law and especially of the First Amendment. Such was the purpose and effect of this Court's pronouncements in *Miller v. California*, 413 U.S. 15 (1973), where the Court stated:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these spe-

> cific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.
>
> 413 U.S. at 27.

This fair notice concept is, thus, an essential component of the First Amendment.

The issue presented by this case is simply stated and yet is constitutionally significant. What must a charging instrument contain to meet the *Miller* notice requirement? This Court addressed the constitutional sufficiency of an indictment in the federal context in *Hamling v. United States,* 418 U.S. 87 (1974), under 18 U.S.C. § 1461. In *Hamling,* the Court stated the measuring test regarding the sufficiency of the charging instrument:

> It is generally suffi ient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' United States v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135 (1882).
>
> 413 U.S. at 117.

In applying this test to the indictment in *Hamling,* the Court concluded that there was no ambiguity within the federal obscenity statute and that an indictment merely alleging that material was obscene was constitutionally sufficient. The present case, however, presents a distinctly different situation, where the state statute is unconstitutional on its face and the judicial saving constructions that have been rendered upon it have resulted in a patchwork quilt of borrowed First Amendment principles that fail to guide a criminal defendant in the constitutional sense.

The Illinois Obscenity Statute does not meet the *Miller* standards for obscenity on its face. Indeed, the present standards for the legal definition of obscenity under Illinois law are as follows:

> (a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest;
>
> (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) the material is utterly without redeeming social value.
>
> *People v. Ridens (Ridens I)*, 51 Ill.2d 410, 282 N.Ed.2d 691 (1972), vacated and remanded as *Ridens v. Illinois*, 413 U.S. 912; *People v. Ridens (Ridens II)*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), aff'd *Ward v. Illinois*, 431 U.S. 767 (1977); *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975).

A comparison of these essential components of Illinois obscenity law, and the statutory definition of obscenity, demonstrates an absolute ambiguity that cannot be resolved by the mere allegation that a work is obscene in a criminal complaint.

This Court has set the constitutional trend for obscenity litigation over the past three decades. In *Roth v. United States*, 354 U.S. 476 (1957), *Memoirs v. Massachusetts*, 383 U.S. 415 (1966), and *Miller v. California*, 413 U.S. 15 (1973), principled efforts were made by the Court to give clarity and guidance in a troubled and confusing area of the law. Only recently the Court has again granted review of a case that squarely puts in issue the constitutional limits in the First Amendment context of a

state obscenity statute. *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d 482 (9th Cir. 1984), probable jurisdiction noted, *Eikenberry v. J-R Distributors, Inc.,* — U.S. —, 105 S.Ct. 76 (1984). This case, too, would permit the Court to provide necessary constitutional embellishment under the First and Fourteenth Amendment.

The trial court here correctly recognized that criminal complaints containing incorrect averments of the elements of obscenity should not stand. Indeed, the trial court recognized the defendants' rights to First Amendment notice in these criminal cases. The proper tripartite allegations for the test of obscenity are essential and, thus, this Court should grant certiorari to emphasize such notice requirements.

———o———

CONCLUSION

Because of the significance of the First Amendment interests at stake in this litigation, this Court should grant certiorari to review and reverse the holding of the Appellate Court of the State of Illinois, Second District.

Respectfully submitted,

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December, 1984

APPENDIX

Exhibit A

Nos. 83-393, 83-394,
Cons.
83-395, 83-396.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

JON C. BAILEY, RANDY E. McCASLIN,
JOHN R. FINDLAY & RODNEY LEIFHEIT,

Defendants-Appellees.

Appeal from the Circuit Court for the
Sixteenth Judicial Circuit,
Kendall County, Illinois

Publ. In Full

Filed June 27, 1984

JUSTICE VAN DEUSEN delivered the opinion of the court:

The defendants in these consolidated cases were charged separately by complaint or amended complaint with the offense of obscenity in violation of section 11-20(a)(1) of the Criminal Code of 1961 (Ill.Rev.Stat. 1981, ch. 38, par. 11-20(a)(1)). The trial court, relying upon *People v. Ridens* (1974), 59 Ill.2d 362, *cert. denied* (1975), 421 U.S. 993, 44 L.Ed.2d 483, 95 S.Ct. 2000, found the complaints to be insufficient because they did not include the

third definitional element of the offense of obscenity, namely that the materials were "utterly without redeeming social value." The court dismissed the complaints and the State has appealed. The critical issue on this appeal is whether, in addition to setting forth the allegations of conduct of the defendants which would establish the elements of the offense of obscenity as set forth in section 11-20(a) of the Criminal Code of 1961, the charging instrument in an obscenity case must also set forth the definitional elements of the term "obscenity" or "obscene" as used in the Illinois obscenity statute.

We agree with the State and find the case of *People v. Vavrys* (1964), 47 Ill.App.2d 258, to be dispositive of this issue. In *Vavrys,* the court addressed the same issue, to wit; the sufficiency of an obscenity information which alleged the commission of the offense solely in terms of the elements of the offense as set forth in the statute itself. The *Vavrys* court correctly found that it was not necessary to set forth in the charging instrument the elements of the definition of obscenity. (47 Ill.App.2d 258, 261-62.) The addition of a statement in the charging instrument setting forth that the magazine or movie in question, taken as a whole, appeals to prurient interests in sex, that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and that the material is utterly without redeeming social value would be a legal conclusion of the prosecutor and constitute mere surplusage. See 47 Ill.App.2d 258, 262.

The defendants contend that the Illinois obscenity statute on its face fails to give fair guidance to putative defendants, and therefore Federal constitutional first

amendment rights require the terms of the obscenity definition to be correctly set forth in the charging instrument in order to give defendants proper notice of the nature of the charged offense. However, the very case upon which the trial court relied in dismissing the complaints refutes this argument. In *People v. Ridens* (1974), 59 Ill.2d 362, *cert. denied* (1975) 421 U.S. 993, 44 L.Ed.2d 483, 95 S.Ct. 2000, the supreme court upheld the constitutionality of our obscenity statute against charges that it was vague and overbroad and, when measured against the due process requirement that a criminal statute give a person of ordinary intelligence fair prior notice that his contemplated conduct is forbidden, the court further deemed our obscenity statute to be sufficiently definite. (59 Ill.2d 362, 369-75; see also *Ward v. Illinois* (1977), 431 U.S. 767, 52 L.Ed.2d 738, 97 S.Ct. 2085.) Based upon the *Ridens* decision, we reason that it is the obscenity statute itself, as judicially construed, and not the charging instrument, which must advise the defendant of the meaning of obscenity and thereby forewarn him, in advance of his actions, whether or not his contemplated conduct is proscribed.

The defendants also contend that the trial court was correct is dismissing their complaints because the allegations inacurrately set forth the definitional elements of obscenity. While it is correct that the definitional elements as alleged in the complaints did not conform to the requirements of the Illinois obscenity statute as authoritatively construed by the *Ridens* court, the language used by the State constituted surplusage and did not make the complaints insufficient. Rather than dismissing those complaints, the remedy which the trial

court should have employed was to strike all language setting forth the definitional elements of obscenity as surplusage. *Cf. People v. Dyer* (1977), 51 Ill.App.3d 731; *People v. Young* (1973), 12 Ill.App.3d 310, 314.

The trial court's order dismissing the complaints or amended complaints in each of the following designated proceedings are reversed and the causes are remanded to the trial court for further proceedings.

1. People v. Jon Bailey—Appellate Court #83-393
   16th Judicial Circuit, Kendall County
   (a) trial court #82 CM-295—amended complaint
2. People v. Randy McCaslin—Appellate Court #83-395
   16th Judicial Circuit, Kendall County
   (a) trial court #83 CM 78—complaint
3. People v. John R. Findlay—Appellate Court #83-395
   16th Judicial Circuit, Kendall County
   (a) trial court #82 CM 293—amended complaint
   (b) trial court #82 CM 294—amended complaint
   (c) trial court #82 CM 308—amended complaint
   (d) trial court #82 CM 309—amended complaint
   (e) trial court #83 CM 83—complaint
4. People v. Rodney Leifheit—Appellate Court #83-396
   16th Judicial Circuit, Kendall County
   (a) trial court #83 CM 59—complaint
   (b) trial court #83 CM 60—complaint
   (c) trial court #83 CM 61—complaint

REVERSED AND REMANDED.

NASH and UNVERZAGT, JJ., concur.

Exhibit B

60564

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1984

Mr. J. Steven Beckett
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No. 60564—People State of Illinois, respondent, vs. Jon C. Bailey, et al., petitioners. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.

Exhibit C

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS OBSCENITY STATUTE Ch. 38, § 11-20, ILL. REV. STAT.

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or posseses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or erection, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is

obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution of an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

No. 84-1009

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Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioners have presented a substantial federal question where this Court's decisions in *Hamling v. United States* and *Ward v. Illinois* dispose of their claim?

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No. 84-1009

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Supreme Court of the United States

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PEOPLE OF THE STATE OF ILLINOIS,

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On Petition For A Writ Of Certiorari To The
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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully in the argument contained herein, respondent does not believe that petitioners have shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

REASONS FOR DENIAL OF THE WRIT

PETITIONERS HAVE FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE THIS COURT'S DECISIONS IN *HAMLING V. UNITED STATES* AND *WARD V. ILLINOIS* DISPOSE OF THEIR CLAIM.

Petitioners contend that their indictments for obscenity are defective because they do not incorporate the tripartite definition of obscenity adopted by the Illinois Supreme Court in *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), and *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975). This Court, however, has expressly rejected the claim that due process requires the term obscenity to be defined in an indictment. *See Hamling v. United States*, 418 U.S. 87, 119 (1974). Accordingly, petitioners have failed to present a substantial federal question for review.

In *Hamling*, this Court reiterated that as judicially construed both prior to and after *Miller v. California*, 413 U.S. 15 (1973), the federal obscenity statute prohibiting the mailing of "obscene, lewd, lacivious or filthy" material is not unconstitutionally vague for failing to provide a defendant reasonably ascertainable standards of guilt. 413 U.S. at 116; 18 U.S.C. §1461. This Court further recognized that because "obscene" is a legal term which has been sufficiently explicated to give a defendant notice of the charge against him, its definition need not be included in the indictment. *Id.* at 119. Seeking to distinguish *Hamling*, petitioners charge that the Illinois statute "is a patchwork of borrowed First Amendment principles that fail to guide a criminal defendant in the constitutional sense." (Petition at 7) This suggestion, however, wholly ignores *Ward v. Illinois*, 431 U.S. 767 (1976), wherein this Court found it to be at least as clear as in *Hamling* that the

statute as construed by the Illinois courts conforms to *Miller*'s notice requirements. *Id.* at 774-76. In any event, as in *Ward*, petitioners cannot claim that the statute gave them no notice that the specific conduct with which they were charged was proscribed by Illinois law. *See id.* at 771-73.*

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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* The indictments in the present case charged petitioners with selling materials depicting such acts as anal intercourse, group masturbation, fallatio, cunnilingus, and rectal insertion of prosthetic devices. (*See* Appendix to the People's brief on appeal)